United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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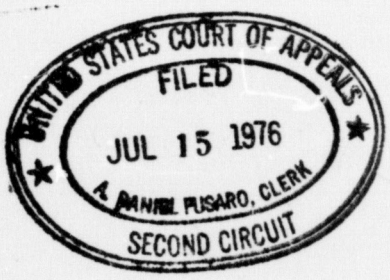

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-6115
Docket No. 76-6022
Docket No. 76-6081

B
P/S

THE STATE OF NEW YORK,

Plaintiff-Appellant,

-against-

THE NUCLEAR REGULATORY COMMISSION, and WILLIAM ANDERS as Chairman; THE ENERGY RESEARCH and DEVELOPMENT ADMINISTRATION and DR. ROBERT C. SEAMANS as the Administrator; THE DEPARTMENT OF TRANSPORTATION, and WILLIAM T. COLEMAN as Secretary of Transportation; THE DEPARTMENT OF STATE and HENRY A. KISSINGER as Secretary of State; THE CIVIL AERONAUTICS BOARD and ROBERT D. TIMM as the Chairman; THE FEDERAL AVIATION ADMINISTRATION and ALEXANDER P. BUTTERFIELD as the Chairman; THE UNITED STATES CUSTOMS SERVICE and VERNON B. ACREE as Commissioner and FRED R. BOYETT as Regional Commissioner,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Preliminary Statement

The State of New York submits this brief in reply to the brief of defendants-appellees ("defendants") in this consolidated appeal by the State from three orders of Hon. William C. Conner.

The Facts

Critical portions of defendants' recitation of the "Facts" of this case (Def. Br. pp. 4-22) seriously misrepresent to this Court the evidence which came before the District Court on plaintiff's motions for preliminary injunctive relief and the true nature of the danger involved in the commercial air and related connecting transport of special nuclear materials ("SNM").

Terrorism

Because a "higher degree of security is essential" defendant Energy Research and Development Administration ("ERDA") suddenly has announced that it will take over the transportation of all strategic amounts of non-weapons SNM by October 1 of this year. Nuclear News, June 1976, p. 125, copy attached as Appendix "A". These shipments had been made until now by commercial transport.*

*ERDA makes numerous domestic and international shipments of SNM (Pl. Br., p. 7).

Plaintiff is unaware of any action by the Nuclear Regulatory Commission ("NRC") to similarly remove from commercial transport SNM shipments by its industry licensees although defendants have stated:

> "As a matter of ERDA and NRC policy, the control measures imposed on plants and transportation of ERDA license-exempt contractors and of NRC licensees are either the same or comparable." (A. 493)*

ERDA's recent finding that a higher degree of security is essential indicates the vulnerability of ERDA and NRC controls on commercial air and related connecting transport to terrorist action, as repeatedly attested to below by the State's experts, Messrs. Mason and Leamer (A. 949-983, 1033-1042, 1171-1180).** Of course, the new ERDA plan will apply only to strategic amounts of SNM, that is, 2 kilograms of plutonium or 5 kilograms of U_{235} enriched to 20% or more, although lesser amounts present significant dangers (A. 1172). Moreover, plaintiff does not concede that ERDA's new plan will eliminate the possibility of terrorist action directed toward the strategic quantities of SNM in air and related connecting transport to which it will apply, since it is not clear how the plan will operate.

*The prefix "A" denotes references to pages of the three volume Joint Appendix and the first volume of the two volume Supplemental Appendix.

**It is interesting to note that Edlow International Company, a nuclear materials shipper, had objected to the new ERDA plan. Nuclear News, supra. Previously, Jack Edlow, Vice-President of the Edlow Company, had submitted an affidavit in opposition to the State's second motion for a preliminary injunction which affidavit consisted in large part of hearsay and self-serving statements. (A.1136).

The value of the statement in defendants' brief that there is no record of an SNM shipment having been stolen or sabotaged over the past 25 years (Def. Br., p. 20) is diluted significantly by ERDA's recent action and prior statements on the record wherein defendants admit that the recent increase in terrorist activity and increase in SNM shipments have made the adequacy of safeguards an ever more important concern. (A. 427, 465, 575).

Defendants' brief devotes approximately 1 1/2 pages to the issue of safeguards (Def. Br., p. 19-20). One page of that is merely a reiteration of certain NRC regulations. The ineffectiveness of these regulations was specifically discussed by the plaintiff's experts on safeguards in their three affidavits below and, more importantly, in the report prepared for the NRC and released in December of 1975 (MITRE Technical Report 7022, September 1975) entitled The Threat to Licensed Nuclear Facilities ("MITRE Report"). (A. 1174-1175). The thrust of these regulations is that of protecting against loss, misrouting and casual commercial theft (A. 1176). The requirements of 10 CFR Part 73 have numerous deficiencies, for example:

1) Shipments of less than 5 kilograms of U^{235} enriched to 20% or more or 2 kilograms of plutonium are not covered (A. 115, 1172, 1176, 220);

2) the number of guards provided for and their arming is minimal (A. 1177);

3) minimum standards and implementation dates are not specified for the regulations' plans for selecting, qualifying and training guards and use of specially designed trucks (A. 1176);

4) communication requirements in terms of the frequency of communication in transit as well as the number and capability of communication channels are inadequate (A. 1177).

In addition to the weaknesses in the present communication systems required by the regulations, the so-called "expediting" techniques described in the regulations and defendants' brief reflect only "a goal of detection, rather than prevention, of diversion" of SNM. (A. 1179, 968)

SNM in commercial air transport is significantly more vulnerable to terrorist and criminal action than certain military surface options. (A. 969-970) Evidence on this point was presented to the District Court on the plaintiff's first motion for a preliminary injunction made in May 1975 (A. 949), which was denied without an evidentiary hearing (A. 895).* Not once in defendants' brief do they respond to the State's demonstration of the availability of more secure military surface alternatives to commercial air and related connecting transport.

This type of omission is equally obvious with respect to the record developed by the plaintiff on the second motion for preliminary injunction. There it was demonstrated that the commercial air mode is significantly more hazardous in terms of terrorist and criminal activities than are several military

*The defendants conclusory statements as to the security of an air shipment once it is airborne is in direct conflict with the evidence adduced below on plaintiff's first motion for a preliminary injunction, which demonstrated the ease with which one man on the ground could bring down a jet aircraft. (A. 958, 957) Such a danger is greatly diminished through the use of military facilities and vehicles for transport. (A. 1038-1039)

assisted air alternatives involving the use of solely military helicopters for short hauls and/or aircraft for long hauls, surface convoys and airfields, or the use of these military systems in an integrated fashion with commercial systems. (A. 1033-1042). It should be noted that, contrary to defendants' assertion (Def. Br., p. 2), plaintiff does not ask this Court to "replace" commercial air transport of uranium with military assisted air transport. Plaintiff merely has demonstrated the availability of the military alternative.

Aircraft Accidents

Virtually all of the discussion in defendants' brief of the accident hazards stemming form the air shipment of SNM consists of references to affidavits submitted by defendants below which were fully rebutted in the reply affidavits of the State submitted on its first motion for a preliminary injunction. Defendants never overcame this rebuttal by the State's experts at any time during the remainder of the proceedings below.

The roots of the federal safety regulations, of which defendants speak so highly in their brief, can be traced back through the International Atomic Energy Agency to the U.S. Interstate Commerce Commission ("ICC"). Moreover, the safety standards as modified in 1968 by the now defunct Atomic Energy Commission ("AEC") and the ICC have "remained essentially the

same since that time" and have been simply adopted by the NRC, successor to the AEC, and DOT (A. 287).*

Utilizing the NRC's own affidavits and reports, the State demonstrated on reply to defendants that between approximately 5% and 30% of aircrashes studied could indeed puncture SNM containers (A. 713). Moreover, SNM containers should be redesigned to withstand ground impact at freefall terminal velocity to which cargo can be subjected as a result of "cargo compartment failure caused by mid-air collision, structural failure by fatigue in heavy turbulence and intentional or accidental explosions." (A. 622). Defendants' statements in their brief (p. 15, n. 2) as to container integrity are grossly misleading. The Sandia drop tests conducted for the NRC resulted in impacts at 130 feet per second damaging the inner vessel; the Sandia Report noted that if the impact speed were raised slightly "spillage of the nuclear material is likely." (A. 624). As Irving Pinkel pointed out in reply to defendants:

*Defendants' statement at p. 12 of their brief that plaintiff has repeatedly approved air shipments of plutonium in present containers is simply not supported by the record. Defendants claim that four export shipments of plutonium in 1974 "originated" from a state owned and operated facility. This is false. The Atomic Space and Development Authority ("ASDA"), which was a public benefit corporation, did not own or ship the plutonium in question. Various utility companies from around the country, who owned the material, stored it at the ASDA facility. The shippers informed ASDA that they were going to move the plutonium in a particular container and ASDA gave the required notice to the federal government which had previously approved the container design upon the application of a member of the industry (A. 584). (Footnote continued on next page).

*Footnote continued

Indeed, defendants' references to New York as an "Agreement State" are ironic since the Agreement purportedly 1) applies to special nuclear materials only if in quantities insufficient to form a critical mass; 2) does not apply to exports or imports; 3) provides that the State agree to use its best efforts to develop rules by which reciprocal recognition will be accorded NRC licensees; and 4) provides that the State modify its Health, Sanitary and Industrial Codes so as to exempt (except for registration, notification, inspection and routing and scheduling of material in transit) AEC (now NRC) licensees (A. 260-1). Moreover, a Memorandum of Understanding, dated May 13, 1965, implementing the Agreement purports to further restrict State regulation of hazards regulated by the AEC (now NRC).

> "In many crashes the cargo bay is compressed by deformation of the understructure. Some cargo is likely to be subjected to crushing loads . . .
>
> Damage to inner vessel by projectiles or spearlike objects should be expected. . ." (A. 623).

These piercing objects can include fragments of engine turbine wheels, other cargo, or hydraulic system components which explode in the heat of the crash-fire (A. 624).

The present container regulations do not anticipate any of a number of accident hazards and severely underestimate other hazards, as for example, crushing loads, fire, corrosion, and the penetration potential mentioned above. The containers represent "antiquated technology" and a "casual" attitude by the NRC toward safety design.

Irving Pinkel concluded:

> "The containers now in use are clearly not designed from a complete knowledge of the crash environment nor do they use the best of current state-of-the-art technology for protecting articles . . . in the air-crash environment." (A. 628).

Defendants' reliance on ground accidents in which SNM containers withstood the accident forces is misplaced. Mr. Pinkel pointed out:

> "[S]urface modes [of transport] do not involve the higher velocities and other significant elements present in air operations. . ." (A. 630). (See also District Court opinion, A. 903).

In fact, Mr. Pinkel believes that present containers may have been designed for rail transport. "Thus surface modes of transport could suffice while the container designed for air is developed." (A. 630).

Defendants persist in placing all reliance on the purportedly remote probability of an SNM disaster. Replying to defendants' affidavits Irving Pinkel stated:

> "The point is that even events with 'remote' possibility do occur and in the aviation field, have occurred. The thing that must be kept in view is the dimensions of the consequences. . . . [T]he probability should be reduced from remote to virtually zero. The fact that no significant accident has occurred can only be considered fortunate." (A. 629).

Plutonium is deadly if inhaled or ingested. (A. 643). Dr. John Gofman, Dr. Marvin Resnikoff and Peter N. Skinner rebutted the affidavit of Mr. Barker submitted by defendants on the issues of plutonium toxicity, dispersion, resuspension, and decontamination. (A. 640-697, 705-714).

Notably defendants give a misimpression as to the particle-size in air shipments of plutonium. As noted by Mr. Skinner and Dr. Gofman, the particle size is in the range of 1 micron (A. 642-643). The NRC can state only that particles larger than 10 microns will not be inhaled through the nose (A. 397). Defendants claim that the "stickiness" of plutonium will mitigate harm from a release. Obviously Dr. Karl Z. Morgan did not feel he could rely on such stickiness when, as Health Physics Chief of the AEC's Oak Ridge Laboratory, he had nearby

roads and buildings spray painted and tarred after a plutonium release. The roads and buildings were then, sawed down and taken up piece by piece, bagged and buried. (A. 617-618). Dr. Gofman notes that, in an air crash with a fire and/or explosion, plutonium particles can become immediately airborne and exposure to and inhalation by humans will occur even before particles have the opportunity to stick to anything. (A. 645)*

*While the defendants feel that it is alright to play the "probabilities" game with the lives of citizens, they condemn plaintiff (Def. Br., p. 18) for playing a "numbers game" in the affidavits of Dr. Gofman (A. 640 & 790) and the first affidavit of Dr. Resnikoff (A. 143), which differed as to the numbers of deaths to result from a plutonium release. Defendants fail to address the record in their brief, which shows that, at the time of his first affidavit, Dr. Resnikoff did not have the benefit of new information incorporated in Dr. Gofman's study, which would have led Dr. Resnikoff to predict much higher dosages to exposed humans (A. 647). Defendants then speak of "evasive action" that could be taken after a plutonium release as if it were an everyday maneuver. Dr. Gofman addressed the possible evacuation of the New York City region and noted that the "economics and social implications" of this for the people and "economy of the country" as well as the city would represent an unparalled peacetime disaster (A. 651). Dr. Gofman also notes that many people have indeed been afflicted with cancer as a result of the five tons of plutonium fallout from weapons testing but notes that the impacts of an air crash in a metropolitan area and release of plutonium would be much more severe due to the small area and concentrated population involved (A. 646). Mr. Barker of the NRC is misleading when he states that 12 persons having 23 and 24 years of exposure time to plutonium have evidenced no physical changes. These individuals are just entering the age period where cancers from their explosure can be expected (A. 643). Lastly, while it is true that dispersal of a small amount of plutonium over a large area might limit the amount any one person could inhale, it would not limit the numbers of resultant cancers (A. 646-647, 709-710).

After review of the evidence proferred by Dr. Gofman and Dr. Resnikoff, it is apparent that the defendants' reliance on Mr. Barker's unfounded conclusions is misplaced.* Moreover, even Mr. Barker's analysis results in thousands of deaths from a release of 1.25 kilograms of plutonium (A. 715).

*Contrary to the assertions in defendants' brief , Mr. Barker is in conflict with the Draft Environmental Statement ("Draft EIS") on the transportation of radioactive materials, which reaches the ludicrous conclusion that only 617 people will die from a 10 kilogram release of plutonium in the New York area. (Supplemental Appendix, ["S.A."] Volume II, p. ii).

The Draft EIS itself is a conclusory, self-serving document. Notably the Draft EIS is replete with unidentified authority for its conclusions; for example, it often cites "Personal Communications" as references for critical points and assumptions (S.A., Vol. II, pp. V-14, V-24). Even more outrageous is the reliance of the Draft, in its discussion and conclusions on safeguards (S.A., p. VII-9), on the yet to be written safeguards chapter in the Generic Environmental Statement on Mixed Oxide Fuels ("GESMO") which was the central issue in this Court's recent decision in Natural Resources Defense Council, et al. v. NRC, et al., Slip Op. 3897 (May 26, 1976). Nor does the Draft respond in anyway to the safeguards issues raised by the State of New York in this litigation and in papers filed last year in the NRC's administrative proceeding on the transportation of radioactive materials. Moreover, it should be noted that the Draft was included in the record on this appeal by the District Court over the objections of plaintiff (A. 1213-16, 1227). The District Court did so even though 1) the court had stated in its opinion that it had not relied upon the substance of the Draft in making the May 7, 1976 order (A. 1206, n.6); 2) the Draft had been delivered to the Court over 2 months after the last affidavit was submitted on the second preliminary injunction motion and virtually on the eve of the expected decision on the motion (A. 1183); and 3) after plaintiff had asked to be given the opportunity to reply to the Draft, if the Court were to consider the Draft (A. 1185, 1189), the Court did not give such notice and accordingly plaintiff did not reply to the Draft (A. 1216). The plaintiff has just recently completed its comments on the Draft in the NRC administrative proceeding.

Effects Of An Injunction

In discussing the effects of a preliminary injunction, defendants fail to point out that the very NRC and ERDA legislation* which they claim has rendered certain aspects of this case moot also has, to a similar extent, lessened the inconvenience to defendants of injunctive relief. Plutonium, as used for domestic and foreign experimentation and research and as used for reactor fuel abroad (Def. Br., pp. 4-5) has already been removed from air transport by Congress, with the exception of national security items. It is significant that defendants have not attempted to show any inconvenience resulting from the NRC and ERDA Acts.

Defendants argue that a preliminary injunction could have an impact on American foreign relations and further strain to argue that a sudden halt of air shipments of SNM could undermine the carefully established reputation of the United States as a dependable source of nuclear materials.

This ignores the probable impact upon our reputation abroad and upon the entire nuclear program if there were an incident involving SNM air shipments.** Surely the difference

*Section 201 of the NRC Appropriations Act, 89 Stat. 413 (1975) (the "NRC Act") and sections 501 and 502 of the ERDA Appropriations Legislation, 89 Stat. 1063 (1975) (the "ERDA Act"); see plaintiff's main brief, Appendices "B" and "C".

**The plutonium spills over Thule, Greenland and Palomares, Spain, which did not result from a nuclear explosion but were genuine dispersals of the material, fortunately occurred over sparcely inhabited wilderness and farmland. The massive task of decontamination of these areas is discussed in plaintiff's main brief at pages 23-24.

between a 7 hour trip by air and a trip of 3 to 5 days by boat can be justified in order to maximize the safety of these non-emergency supply shipments. In Irving Pinkel's words,

> "Not only are the people exposed to contamination threatened, but the whole development of the nuclear power industry world-wide would be jeopardized by the news that a spill occurred, however few the resulting casualties." (A. 620-621).*

Moreover, what arguments do defendants offer against the use of military air transport for international shipments of highly enriched uranium? In what possible way will our prestige abroad and image of "dependability" be impaired by the use of more secure forms of air transport?

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* It must be remembered that the state does not seek the cessation of SNM shipment by all modes of transport. It seeks a cessation of the air transport of plutonium and the commercial air transport of uranium.

Defendants try to infer that the continued unrestricted air shipment of all SNM abroad is vital to permit the U.S. to further its policy of curtailing the proliferation of nuclear weapons. (Def. Br., p. 21-22). The logic underlying this is not readily apparent. Indeed others would argue that precisely the opposite is true. The first chairman of the Atomic Energy Commission, David E. Lilienthal, has this year stated that in his view the United States must unilaterally "order a complete embargo to the export of all nuclear devices and all nuclear material" to avoid the "impending disaster" of the rapid international spread of nuclear bombs. (A. 1169-1170).

ARGUMENT

I THIS COURT HAS JURISDICTION OF THE APPEAL FROM THE ORDER OF MAY 7, 1976, WHICH DENIED A PRELIMINARY INJUNCTION.

Contrary to the defendants' assertion, both orders denying preliminary injunctive relief are properly before this Court. The order of May 7, 1976, clearly did refuse a preliminary injunction. As indicated in the order (A. 1201-4) and as defendants concede (Def. Br., p. 24), the District Court held that it lacked jurisdiction of the motion for a preliminary injunction. A denial on jurisdictional grounds is a denial nonetheless.

As plaintiff pointed out at pages 30-31 of its main brief, the District Court erred in determining that it lacked jurisdiction of the motion. Defendants seek to confuse matters by arguing that plaintiff's motion, like the motion in Ideal Toy Corp. v. Sayco Doll Corp., 302 F. 2d 623 (2d Cir. 1962), was a motion "to reopen" a prior decision under Rule 62(c) of the Federal Rules of Civil Procedure (Def. Br., p. 25). The motion in Ideal Toy was treated as a motion under Rule 62(c) but Rule 62(c) does not deal with motions "to reopen." That rule deals with a specific type of motion not at issue here, i.e., a motion for an injunction pending appeal. At issue here is a motion under Rule 65(a) which is simply a motion for a preliminary injunction.

Thus, the District Court's statements that the second motion only contained a de minimis change from the first motion and that accordingly the second motion sought "to reopen" the prior decision do not demonstrate that the instant case is like Ideal Toy (A. 1203-03). In any event, the argument that the difference between the two motions was de minimis can get no support from plaintiff's indication below that, if the relief requested in the second preliminary injunction motion were granted, the prosecution of the appeal from the first preliminary injunction motion might not be necessary. The fact that plaintiff might have been satisfied with the different relief requested in the second motion does not make the difference in relief requested or the difference in the affidavits submitted on the motions de minimis.*

In urging this Court to rule that the District Court erred in holding that it did not have jurisdiction of the second preliminary injunction motion, plaintiff does not seek a remand. Here the District Court already has indicated what it would do if it took jurisdiction, namely, require an evidentiary hearing. However, this disposition also would constitute a denial of the preliminary injunction motion.

* It should be noted that plaintiff has always taken the position in the District Court and in this Court that if the second motion were not granted, it would be desirable to pursue plaintiff's appeals from the two orders simultaneously. A. 1032; Affidavit of John F. Shea, III, in Support of Motion to Consolidate Appeals, February 19, 1976, p. 2.

As pointed out at page 30 of plaintiff's main brief, the only point of the preliminary injunction motions relates to whether defendants may take major federal actions significantly affecting the environment during the time before they may comply with the impact statement requirement of the National Environmental Policy Act of 1969 ("NEPA"). In light of the chronology of the injunction motions set forth on pages 24-30 of plaintiff's main brief and in light of defendants' statement that an environmental impact statement presently is expected to be filed in November 1976 (Def. Br., p. 3), a direction for an evidentiary hearing would amount to a denial of preliminary injunctive relief.* Even defendants concede that there probably would not be time for an evidentiary hearing before the filing of an environmental impact

* Contrary to defendants' assertion, there is support for the proposition that, even if the injunction had not been denied on jurisdictional grounds, the order would have been appealable as a denial of an injunction under 28 U.S.C. § 1292(a). Orders having the practical effect of a denial of an injunction are appealable under § 1292(a) even if they are not denials in form. McCoy v. Louisiana State Board of Education, 332 F. 2d 915 (5th Cir. 1964); see, Brunson v. Board of Trustees of School District No. 1 of Clarendon County, South Carolina, 311 F. 2d 107 (4th Cir. 1962); U.S. v. Lynd, 301 F. 2d 818 (5th Cir.), cert. den. 371 U.S. 893 (1962); In N.A.A.C.P. v. Thompson, 321 F. 2d 199 (5th Cir. 1963) and in U.S. v. City of Jackson, 519 F. 2d 1147 (5th Cir. 1975), cited by defendants, the time involved in further judicial consideration would not have caused the denial of all of the relief requested in the motion, the feared result in the instant case.

statement* (Def. Br., p. 24). Defendants' assertion that plaintiff is to be blamed for any delay with regard to the injunction motions is outrageous in light of the chronology set forth at pages 24 to 30 of plaintiff's main brief.

Moreover, a review of the affidavits and other materials in the appendix will make clear that the admitted facts alone amply demonstrate the possibility of irreparable harm and require the issuance of an injunction. Some of the admitted facts in the affidavits were summarized on pages 19 through 23 of Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction, dated June 6, 1975 (copies of which pages are attached herein in Appendix "B") and in pages 1174-75 and 1177-78 of the Joint Appendix.** Any factual disputes regarding harm basically are quarrels about matters of degree. Hence an evidentiary hearing in any event would be unnecessary.

It is worth noting that in Phillips v. Crown Central Petroleum Corp., 376 F. Supp. 1250 (D. Md. 1973), the court, in granting a preliminary injunction without an evidentiary hearing, stated:

* Of course, defendants' assertion that the filing of an environmental impact statement in November 1976 would moot the action is dependent upon the adequacy of the statement's compliance with the requirements of NEPA.

** In addition the Draft EIS makes numerous admissions, including the following: The "potential consequences arising from any nuclear explosive are so serious as to warrant the utmost vigilance, however low the probabilities may be." (S.A., Appendix F-2, Emphasis supplied) (footnote continued on next page)

"Undoubtedly there are some conflicts in the affidavits which can be resolved only by an evidentiary hearing. But there are enough essential facts about which there is little dispute for the Court to reach the necessary inferences for a decision here." Id. at 1254.

(Footnote continued)

** The Draft EIS nevertheless admits that as to NRC's overall policy on safeguards, while safeguards must be capable of preventing acts which could result in "major civil disaster," safeguards need only provide a "high degree of protection" against acts that could result in "serious civil damage." (S.A., p. VII-2)

The Draft EIS admits that persons without prior experience in the fabrication of nuclear explosive devices could at least produce a device with a low tonnage yield, apparently a yield of one kiloton or less, or even a device with a substantial yield (S.A. Appendix F, 1-3).

On pages VII-7-8 the Draft EIS admits that plutonium can be used as a dispersant in weapon form or by dispersing plutonium in transit by sabotaging a shipment and that such use would have serious consequences.

The transportation modes that can be used to safeguard SNM "range from aircraft to conventional ground transport, to use of modes such as rail and barge." (S.A., p. VII-8)

The Draft EIS admits that the use of military airfields and/or aircraft "appears technically feasible." (S.A., p. VII-12)

Accidents involving plutonium dioxide could produce the largest consequences, in terms of physiological effect, of all radioactive materials. (S.A., pp. V-48)

Plutonium is "an extremely toxic material and can cause substantial damage to the body." (S.A., Appendix B, 11)

The Draft EIS admits that as to cannister strength, "there have been only a limited number of containers tested." (S.A., p. V-26)

Shipping all plutonium by rail would achieve the greatest reduction in the probabilities of "annual early fatalities" of all alternatives assessed, namely a reduction by a factor of 2. (S.A., p. VI-53)

Such rail shipment would reduce "latent cancer fatalities by a factor of 3. (S.A., p. VI-27)

Shipping all plutonium by truck would reduce latent cancer fatalities by 21% and "annual early fatalities" by 16%. (S.A., p. VI-26)

II. THE DISTRICT COURT ERRED IN DENYING THE PRELIMINARY INJUNCTION MOTIONS IN ITS ORDERS OF MAY 7, 1976, AND SEPTEMBER 9, 1975.

Defendants suggest the wrong standard for judicial review of the District Court's denials of preliminary injunctive relief. Defendants concede that, where the decision of the district court is based solely upon papers which are also before the Court of Appeals and not upon an assessment of the credibility of witnesses, then the Court of Appeals may review the papers de novo (Def. Br., p. 26). Yet they urge that the standard of review is one of abuse of discretion. Id.

To the contrary, in San Filippo v. United Brotherhood of Carpenters and Joiners, 525 F. 2d 508 (2d Cir. 1975), cited but apparently not understood by defendants, this Court stated:

> "Where, as here, no hearing was held and the court's decision was based on pleadings and affidavits, the credibility of testimony is not at stake. In such a case this Court is not limited to reviewing the district court's exercise of discretion. Since the court rendered its decision on the pleadings and affidavits before it without a hearing, this Court is in as good a position as the district court to read and interpret those documents. Consequently, this Court is able to exercise its discretion and to review the papers de novo. Dopp v. Franklin National Bank, 461 F. 2d 873, 879 (2d Cir., 1972); See Orvis v. Higgins, 180 F. 2d 537, 539 (2d Cir., 1950), cert. denied, 340 U.S. 810, 71 S. Ct. 37, 95 L. Ed. 595."

Id. at 511 (Emphasis supplied); Accord, Munters Corp. v. Burgess Industries, Inc., ___ F. 2d ___, Docket No. 76-7082 (2d Cir., June 2, 1976).

Thus the issue before this Court simply is whether this Court finds that the standard for preliminary injunctive relief has been met under a correct interpretation of the applicable law.

Defendants do not present any arguments on the merits with respect to the District Court's order of May 7, 1976, denying preliminary injunctive relief but raise only the jurisdictional defense rebutted above (Def. Br., pp. 22-26).

As to the September 9, 1975, order, defendants maintain that the District Court's denial of preliminary injunctive relief was correct. On the issue of probability of success on the merits, defendants (with the exception of the CAB and Customs, which we deal with in Point IV below) refer only to the existence of the prohibitions in the ERDA Act and the NRC Act set forth in plaintiff's main brief, Appendices "B" and "C". (Def. Br., p. 29, ft.) In effect, this amounts to a claim of mootness.* However, as described in plaintiff's main brief at

* On the issue of alleged mootness, defendants refer as well to a portion of the Hazardous Materials Safety Act (Def. Br., pp. 10-11, 13, ft). Since plaintiff seeks to enjoin all air transport of plutonium and all commercial air transport of enriched uranium, the provisions in that Act restricting certain shipments to air cargo, as opposed to air passenger, transport obviously do not moot anything.

pages 57 to 58, the ERDA Act as implemented by regulations contains a number of exemptions, including a broad exemption for plutonium shipments having any relation to nuclear weapons programs. The District Court noted that approximately one shipment of plutonium per week was being made under the nuclear weapons program exception (A. 1207, ft. 7). Moreover, neither the ERDA Act nor the NRC Act pertain to uranium. It is significant that, in its decision on the second preliminary injunction motion, the District Court, although taking note of these Acts (A. 1207, n. 7), concluded that defendants had not even posited any argument to controvert plaintiff's showing of probable success on the merits (A. 1206, n. 6).

In a desperate effort to draw attention from their clear violation of NEPA, defendants also attempt to use the ERDA Act and the NRC Act for another purpose. They argue that preliminary injunctive relief should [redacted] be withheld because of what the Acts failed to prohibit. (Def. Brief, pp. 30-32). Defendants advance the novel proposition that the exemptions in the ERDA Act and the NRC Act of certain types of plutonium air shipments amount to a Congressional direction that these air shipments "must be continued" (Def. Br., p. 30). Not surprisingly defendants fail to cite any authority for this kind of statutory interpretation.

Undaunted, defendants go even further and claim that the failure of Congress to deal at all with enriched uranium inthe ERDA Act and the NRC Act is "strong evidence" of the intent of Congress that air shipment of such material should continue.* However, it is axiomatic that one may not make an inference from a legislature's failure to act in such circumstances.

Finally, defendents argue that the Hazardous Materials Transportation Act ("Transportation Act"), enacted well before this suit was instituted, shows Congress' "judgment" that air transport of enriched uranium should continue to be transported "in regular interstate commerce" (Def. Br., p. 31-32). The Transportation Act was in large part intended to consolidate in the Department of Transportation various regulatory functions which had previously been fragmented and provide for more severe penalties for violations of regulations. 120 Cong. Rec. H 12351 (daily ed. Dec. 19, 1974) (remarks of Rep. Jarman).

The only provision of the Transportation Act which addressed itself to the merits of any particular form of

* Apparently even defendants hesitate to infer an intent by Congress, in passing the ERDA Act and the NRC Act, to distinguish between commercial and military air transport of uranium. On the issue of air transport of uranium, it should be noted that Congressman James Scheuer did not receive copies of plaintiff's affidavits regarding the terrorist threat. Defendants' citation is not to the contrary (Def. Br., p. 31, ft.). The legislative history contains no suggestion that uranium was even considered in connection with the ERDA Act and the NRC Act.

transportation was a provision prohibiting any transportation on passenger aircraft of radioactive materials with an estimated specific activity of over .002 microcuries per gram of material (which would include SNM), unless the radioactive materials are for research or medical diagnosis or treatment and then only if such materials as prepared for and during transportation do not pose an unreasonable hazard to health and safety. Even such materials for research and medical diagnosis or treatment as are not specifically banned from passenger airplanes by the Act would be subject to regulation. 49 U.S.C.A. § 1807. It is this prohibitory provision that defendants represent as the Congressional "judgment."

All that was said above with regard to arguments under the ERDA and NRC Acts applies here. Moreover, defendants point to no legislative history to show that the possibility of non-commercial air transport of enriched uranium was even considered. Ironically, defendant ERDA, in its above-mentioned recent take-over of air transport of strategic quantities of SNM, did not feel at all constrained by the claimed Congressional "judgment" that enriched uranium should continue to be shipped by "regular" commercial air transport.

Plaintiff, however, does share defendants' expressed concern for Congressional policy and accordingly urges this Court to enforce the Congressional policy expressed in

NEPA.*

Defendants, however, argue that plaintiff has not shown possible irreparable harm and therefore is not entitled to preliminary injunctive relief. In doing so, they attack plaintiff's argument at pages 34 through 39 of the main brief that defendants' violation of their duty under NEPA itself

* If defendants' argument regarding the various Congressional Acts be read as an inarticulate claim that the acts constituted a pro tanto repeal of NEPA, the claim is clearly without merit. It has often been held that repeals by implication are not favored and that legislative intent to repeal must be clear. See, e.g., U.S. v. Borden Co. 308 U.S. 188, 198 (1939). The rule has been applied to NEPA cases. For example, in Committee For Nuclear Responsibility v. Seaborg, 463 F. 2d 783 (D.C. Cir. 1971), the District of Columbia Circuit held Congressional passage of authorization and appropiation bills for an underground test of a nuclear warhead, even after a NEPA suit regarding the test had been instituted, did not constitute a pro tanto repeal of NEPA. When Congress has intended to make NEPA inapplicable it has done so specifically. Thus Congress passed a law specifically authorizing the construction of the Alaska pipeline without compliance with NEPA and cutting off NEPA judicial review of Interior Department action regarding the project. 43 U.S.C.A. § 1652(d). With reference to the NRC Act, it was pointed out below that Congressman Scheuer, the House sponsor of the NRC Act, had indicated that there was no intent by Congress to have any impact on the applicability of NEPA (A. 783).

constitutes irreparable harm.*

Defendants' attempt to distinguish plaintiff's cases on the grounds that they also involve imminent certain physical injury. However, the cases make it clear that, even where physical injury was involved, the courts in question did not require that the determination of irreparable harm rest on that basis. Environmental Defense Fund v. TVA, 468 F. 2d 1184 (6th Cir. 1972); Scherr v. Volpe, 466 Fed. 1027, 1034 (7th Cir. 1972); Izaak Walton League v. Schlesinger, 337 F. Supp. 287, 295 (D.D.C. 1971). Moreover, the District Court in Izaak Walton, referred not to actual harm but to "alleged dangers" resulting from the activation of a nuclear power plant, which might have a "potential" effect upon the environment. Id. at 295.

* Defendants' claim that the violation of NEPA alone does not support injunctive relief is not supported by the cases cited. In Conservation Society of Southern Vermont v. Secretary of Transportation, 508 F. 2d 927, 936-37 (2d Cir. 1974), the court relied on the fact that the highway interchange project was at an advanced stage of completion. In Greene County Planning Board v. Federal Power Commission, 455 F. 2d 412, 418 (2d Cir.), cert. den. 409 U.S. 849 (1972), the project was 80% complete and 75% of the money had been spent. In Biderman v. Morton, 507 F. 2d 396, 398 (2d Cir. 1974), the court in a per curiam opinion merely upheld the district court's ruling that plaintiffs had failed to show that the environmental effect of agency action "had any significant dimensions", i.e., that NEPA was applicable. In Proetta v. Dent, 484 F. 2d 1146, 1149 (2d Cir. 1973), the court held that a preliminary injunction enjoining disbursal of federal funds was not required where the disbursal would not occur until after a trial on the merits could be had. In Environmental Defense Fund, Inc. v. Callaway, 497 F. 2d 1340 (8th Cir. 1974), the court ruled that there had been full NEPA compliance.

Jones v. District of Columbia Redevelopment Agency, 498 F. 2d 502 (D.C. Cir. 1974), cited by defendants, contains much support for plaintiff's position. By the time of the appeal, final impact statements had been belatedly filed and had not been challenged on the grounds of adequacy. Accordingly the Court of Appeals did not feel that an injunction was warranted at that point. Nevertheless, the Court of Appeals criticized the approach of the District Court:

> "We think that the District Court defined too narrowly the kind of harm that, under NEPA, may be sufficient to warrant the intervention of a court of equity, even at a preliminary stage. The harm against which NEPA's impact statement requirement was directed was not solely or even primarily adverse consequences to the environment; such consequences may ensue despite the fullest compliance. Rather NEPA was intended to ensure that decisions about federal actions would be made only after responsible decision-makers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs. Thus, the harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates. And, for purposes of deciding whether equitable relief is appropriate, we think that this harm matures simultaneously with NEPA's requirements, i.e., at the time the agency is, under NEPA, obliged to file the impact statement and fails to do so." Id. at 512.

The Court concluded that "the imminence of physical steps is not an indispensable condition to preliminary injunctive relief." Id.

Defendants also claim that the injunctions in plaintiff's cases were granted because there would have been an irretrievable commitment of resources rendering an environmental impact statement ineffectual and that such is not the case here. However, defendants' claim that there would still be a benefit from an impact statement completed after an accident misses the obvious point that the human life or other resources destroyed or harmed in the accident would have been irretrievably committed.

Defendants also dispute plaintiff's argument, at pages 53 through 60 of the main brief, that, even if the violation of NEPA itself would not require issuance of the injunction, the admitted facts above, as well as all the facts, amply demonstrate the possibility of irreparable harm and require the issuance of a preliminary injunction. Defendants contend that the possibility of irreparable harm shown by plaintiff is too remote. However, a comparison of even the admitted possibilities of harm in this case with the situations in cases cited by defendants demonstrates that

defendants' contention has no merit.* To the contrary, the test of "possible" injury has been liberally interpreted. See, Leisner v. N.Y. Telephone Co., 358 F. Supp. 359, 369 (S.D.N.Y. 1972).

* None of the cases cited are NEPA cases. Moreover, in Capital City Gas Co. v. Phillips Petroleum Co., 373 F. 2d 128 (2d Cir. 1967) and Triebwasser & Katz v. American Telephone & Telegraph Co., ____ F. 2d ____, Docket No. 76-7095 (2d Cir. May 17, 1976), there was an adequate damage remedy. In Crimmins v. American Stock Exchange, Inc., 346 F. Supp. 1256 (S.D.N.Y. 1972), the court held that a member of the Exchange did not even have likelihood of success in demonstrating that he was entitled to have an attorney at an Exchange hearing. Holiday Inns of America, Inc. v. B & B Corp., 409 F. 2d 614 (3rd Cir. 1969) involved the use of plaintiff's service mark in an area where plaintiff did not do business.

Defendants seek to tie the grant of injunctive relief to preservation of the status quo. In addition to plaintiff's discussion of this issue at pages 44 to 46 of the main brief, it should be noted that case authority supports the proposition that injunctive relief may alter the status quo if possible harm has been shown. See, e.g., Lepore v. New York News, Inc., 346 F. Supp. 755, 762 (S.D.N.Y. 1972) (per Gurfein, J.).

On the issue of the balancing of harm, defendants incorrectly state the rule to be that, even where probability of success, as opposed to merely a serious question, is shown, it is appropriate to balance harms. Neither Dino de Laurentiis Cinmatografica, S.P.A. v. D-150 Inc., 366 F. 2d 373, 375 (2d Cir. 1966) nor Munters Corp. v. Burgess Industries, Inc., supra, support this proposition, which was rebutted at pages 48-a - 52 of plaintiff's main brief.

Defendants make no mention of plaintiff's demonstration of the availability of military surface transport, which was made on the first preliminary injunction motion. On the various military assisted air transport options for enriched uranium which plaintiff demonstrated to be available, defendants can only respond that plaintiff has never shown any authority for the use of the military to assist in the transport of SNM. In the District Court defendants asserted that there was authority prohibiting the use of the military in this manner. The District Court was not impressed with this argument (A. 1207). The

posture on appeal appears to mark a significant retreat on this point.

In any case, the NRC itself has ruled that military assistance is available to protect nuclear power plants operated by licensees from terrorist attack. In a case which raised problems of safeguards for a Consolidated Edison nuclear power plant, the NRC ruled:

> "The rationale of the Commission approach (in 10 CFR § 50.13) in not requiring an applicant to protect against the effects of enemy attacks and destructive acts would also apply to an armed band of trained saboteurs. As in the case of defending against the threat of an attack by an enemy of the United States, it seems that an applicant should be entitled to rely on settled and traditional governmental assistance in handling an attack by an armed band of trained saboteurs." Consolidated Edison Company (Indian Point Station, Unit 2) ALAB-202, RAI-74-5, 825 (May 7, 1974).

In sum, plaintiff has amply demonstrated that the District Court erred as a matter of law and fact in not granting preliminary injunctive relief.

III. THIS COURT HAS JURISDICTION OF THE APPEAL FROM THE ORDER DENYING PLAINTIFF SUMMARY JUDGMENT AND THE DISTRICT COURT ERRED IN DENYING SUMMARY JUDGMENT

The District Court did not deny summary judgment because of any factual issue. Indeed, the court noted the defendants had failed even to posit an argument to show that they were not in violation of NEPA (A. 1206). The reasoning of the District Court in denying summary declaratory relief

amounts to an erroneous rejection of the declaratory judgment claim in its entirety.

Yet defendants claim that the denial is not appealable. However, summary judgment has been granted by this Circuit even where the matter was not argued on appeal. See, Friends of the Earth v. Carey, ___F. 2d___, Docket No. 75-7497 (April 26, 1976). In any event, since this court has jurisdiction regarding the denials of injunctive relief, it can review the merits of the entire case as it now rests. See, 9 Moore, Federal Practice, para. 110.25[1] at p. 273; E.P. Hinkel & Co., Inc. v. Manhattan Co., 506 F. 2d 201, (D.C. Cir. 1974); Kohn v. American Metal Climax, 458 F. 2d 255 (3d Cir. 1971).

Apart from what was said at pages 69 through 73 of the plaintiff's main brief regarding summary judgment, it should be pointed out that a declaration of the applicability of NEPA is hardly academic even if defendants file an impact statement in November, since NEPA requires not only that a statement be filed but that it be adequate. See, e.g., Natural Resources Council v. Callaway, 524 F. 2d 79 (2nd Cir. 1975). A declaration would make it clear that an adequate statement under NEPA, not some sort of gratuitous statement must be filed.

Moreover, as to mandatory relief, it must be pointed out that once again defendants have delayed the filing of a statement. The reason given, i.e., that detailed comments on the draft must be analyzed, is not persuasive since such analyses always must be done before a final statement is filed.

Defendants' protestations of good faith would be more impressive if defendants had not waited until 7 years after the enactment of NEPA to begin an environmental statement. In Sierra Club v. AEC, 6 ERC 1980 (D.D.C. 1974), the court ordered that an environmental impact statement be filed within 12 months where the AEC had stated that it was willing to file a statement but had objected to the specific deadline.

All that plaintiff has pointed out here and in the main brief amply demonstrates the District Court's error in denying summary judgment.

IV. THIS COURT HAS JURISDICTION OF THE APPEAL FROM THE ORDER DISMISSING THE COMPLAINT WITH RESPECT TO THE CAB AND CUSTOMS AND THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT WITH RESPECT TO THOSE PARTIES.

The authority cited in Argument III above, to the effect that, since this Court has jurisdiction over the denials of injunctive relief, it can review the merits of the entire case as it now rests, rebuts defendants' jurisdictional attack here as well.

Of relevance to this Court's resolution of the CAB's involvement in the air transport of SNM is the District of Columbia Circuit's recently issued opinion on the challenges of certain airline companies to five orders of the CAB relating to tariff revisions of those companies. Delta Air Lines, Inc., et al. v. Civil Aeronautics Board, ___F. 2d___, Docket No.

74-1984, (D.C. Cir. June 22, 1976). Previously this Court had grappled with related regulatory interpretations in the case of Air Line Pilots Ass'n, Int'l. ("ALPA") v. CAB, 516 F. 2d 1269, (2d Cir. 1975), in which the court stated that the "sole issue before [it was] whether the CAB order rejecting air line embargoes was properly issued." Id. at 1273 (emphasis added and footnote omitted). The District of Columbia Circuit agrees with this Circuit's procedural rejection of the use of embargoes by air lines to avoid transporting certain dangerous materials including SNM. The Delta case however does discuss at length the regulatory involvement of the CAB in the carriage of these materials.*

The court notes that the DOT/FAA regulations in this area are outer parameters of safety. "[N]o air line can be required to carry articles more hazardous than the most dangerous articles permitted by the FAA." Delta v. CAB, supra. at 23. The FAA promulgates regulations on what air lines may carry. However, the CAB ultimately determines, and most important, issues orders regarding, what items air lines must carry. Id. at 24-25 and 38. The court stated that in assessing these questions of transport:

> "[T]he Board should compare the costs and benefits of carrying hazardous cargo by air with the costs and benefits of alternate means of transportation, e.g. railroad, highway and water." Id. at 21-22.

*This Court noted that the District of Columbia Circuit would consider the propriety of the air lines' use of tariffs to suspend carriage of these dangerous materials. ALPA v. CAB at 1273 & 1274, n. 7.

The court held that the CAB has a duty to "conduct a hearing [on tariff applications] wherein it will consider economic costs, safety hazards, (accepting the outer limits of safety as found by the FAA), common carrier responsibilities, and other factors affecting the transportation of hazardous cargo. . . ." Id. at 24 (Emphasis added).

The case of Voyager 1000 v. CAB cited by defendants involved the review of a CAB order directing the petitioner in that case to cease and desist from engaging in air transportation on a commercial basis, which it had done under the label of a "flying club", in violation of the Federal Aviation Act. Voyager 1000 v. CAB, 489 F. 2d 792, 794 (7th Cir. 1973). The holding is wholly unrelated to any NEPA claim, promotion of safety in air commerce, or the air transport of hazardous materials of any kind. The court in that case did not issue any holding as to the activities of the CAB which relate to the transport by air of SNM.

Defendants argue that the State's complaint as to the CAB is improperly lodged in the District Court because exclusive jurisdiction to review CAB orders is vested in the Court of Appeals.

It is the plaintiff's position that its complaint does not seek ordinary review of orders of the CAB, but rather looks only to the violation of NEPA found in the CAB's formulation and carrying out of decisions, policy and other

actions without first complying with the procedural mandates of the Act.*

NEPA creates new, additional duties for all federal agencies which are distinct from their other statutory duties, and proper jurisdiction for violations of NEPA is in the federal district court. First National Bank of Homestead v. Watson, 363 F. Supp. 466, 471-472 (D.D.C., 1975). In the Watson case it was the contention of defendants that plaintiffs were essentially challenging a ruling of the Federal Reserve Board and that such challenges could only be made in the Court of Appeals. The District Court rejected that argument taking cognizance of the separate legal duty imposed by NEPA which is litigable in district court. Similarly, in an action to enjoin the Secretary of Agriculture from undertaking a program to chemically control insects in the South, the District Court held that:

> "[T]he institution of administrative proceedings under 7 U.S.C. §135, which provides that judicial review of that administrative determination rests in the United States Court of Appeals for the District of Columbia does not deprive this Court of jurisdiction." Environmental Defense Fund, et al. v. Hardin, et al., 325 F. Supp. 1401, 1407 (D.D.C. 1971) (emphasis added).

*In any event, as to CAB tariffs, referred to at page 79 of the plaintiff's main brief, a review of Title 49 U.S.C. and 14 CFR part 221 et seq. shows that there is no specific designation of tariffs as being CAB orders. Tariffs become "effective" if there are no objections filed. A tariff may be rejected by simple letter from the Board. It appears that tariffs most often become orders only after disputes are fully litigated before the Board.

A finding by this Court of jurisdiction over the NEPA claim against CAB makes eminently good sense from the point of view of judicial economy as well. Separate actions on the identical NEPA issues against other defendant agencies in the district court and against the CAB in the Court of Appeals would be of no advantage to the parties or the Courts.

Defendants' assertion that plaintiff should have exhausted administrative remedies is not persuasive. The violation of NEPA is a violation of a clear, non-discretionary legal duty. See, Izaak Walton League of American v. Schlesinger, supra. Moreover, plaintiffs had written to the CAB prior to suit regarding its compliance with NEPA (A. 56-57) and had received an unsatisfactory answer (A. 63).

Plaintiff submits that the District Court erred as a matter of law in dismissing the complaint with respect to the CAB and Customs.

CONCLUSION

THE DISTRICT COURT'S ORDERS OF SEPTEMBER 9, 1975, DECEMBER 23, 1975 AND MAY 7, 1976, SHOULD BE REVERSED IN ALL RESPECTS. PLAINTIFF SHOULD BE GRANTED PRELIMINARY INJUNCTIVE RELIEF AND SUMMARY DECLARATORY AND MANDATORY RELIEF AGAINST ALL DEFENDANTS. THE COMPLAINT SHOULD BE REINSTATED WITH RESPECT TO THE CAB AND CUSTOMS AND THEY SHOULD BE DIRECTED TO ANSWER.

Dated: New York, New York
July 9, 1976

Respectfully submitted,

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APPENDIX "A"

safeguards

SNM

ERDA to assume shipments by October

Because it says a "higher degree of security is essential," the U.S. Energy Research and Development Administration will take over transportation of all strategic amounts of non-weapons special nuclear material by October 1. These shipments are now being made via private shippers. One of them, Edlow International, of Washington, D.C., had objected to ERDA's plan before it was made final.

Following a meeting with Edlow, ERDA reasserted its position. Alfred D. Starbird, a retired Army lieutenant-general and now ERDA's assistant administrator for national security, said, in a letter to the shipper, "Based on our analyses we are convinced that significantly greater security will be provided at an earlier time by expansion of the existing ERDA system" to cover the strategic quantities of SNM.

An ERDA spokesman later emphasized that the agency will continue to study the situation, even as it implements its plan.

October 1 was picked as the deadline after considering the time required to obtain shipping materials and work out security procedures. Contracts with the private shippers will be terminated or adjusted by that date.

III. EVEN IF DEFENDANTS' VIOLATION OF NEPA ITSELF WOULD NOT REQUIRE ISSUANCE OF THE PRELIMINARY INJUNCTION, THE FACTS ADMITTED BY DEFENDANTS ALONE AMPLY DEMONSTRATE THE POSSIBILITY OF IRREPARABLE HARM AND REQUIRE THE ISSUANCE OF THE PRELIMINARY INJUNCTION.

It has been held recently by Hon. Robert J. Ward in a NEPA case affirmed by the Second Circuit that a preliminary injunction merely requires a showing of possible irreparable injury. See, Chelsea Neighborhood Ass'ns v. U.S. Postal Service, supra, at 1185 (emphasis supplied). Accord, Natural Resources Defense Council, Inc. v. Morton 458 F. 2d 827, 832 (D.C. Cir. 1972). A number of cases cited by defendants for the proposition that certain or probable injury must be shown actually support the proposition that possible injury is sufficient. See, e.g., Berrigan v. Norton, 451 F. 2d 790, 793 (2nd Cir. 1971); Robert W. Stark Jr., Inc. v. New York Stock Exchange, Inc., 466 F. 2d 743, 744 (2nd Cir. 1972); Checker Motors Corp. v. Chrysler Corp., 405 F. 2d 319, 323 (2nd Cir.), cert. den., 394 U.S. 999 (1969)

On the basis of facts admitted by defendants alone, more than the possibility of irreparable harm has been demonstrated. It is admitted that defendants permit and execute the air transportation of SNM to, from and over the United States and that no environmental impact statement has been filed pursuant to NEPA which assesses the impact of, and

alternatives to, air transportation of SNM.

Over a recent six month period there were approximately 400 air shipments of SNM. (Def. Aff., Pittman, p. 2). In 1974 there were at least 6 air shipments of plutonium weighing in excess of 2 kilograms each through John F. Kennedy Airport alone. In addition, there were at least 3 air shipments of plutonium weighing in excess of 200 grams each through John F. Kennedy Airport. Many other air shipments of SNM occurred at other points throughout the United States. (Def. Aff., Rouse, p. 3). At least 24 such air shipments of 2 kilograms or more of plutonium were made during 1974 (Def. Aff., Catania, p. 3). Certain shipments, for example, the 140 kilograms of plutonium from Belgium shipped by Transnuclear Inc., were and are handled in several different planeloads. Shipments by air of SNM are projected to increase greatly in the future as the use of nuclear energy becomes more widespread (Defendants' Memorandum of Law, p. 5; Def. Aff., Ray, p. 6; Page, p. 4).

Presently plutonium is used in the United States as a reactor fuel only experimentally. The safety and safeguards questions surrounding the use of plutonium on a wide scale commercial basis in the United States have been deferred by the NRC for final resolution until 1978 pending further environmental review and drafting of an impact statement pursuant to NEPA. 40 Fed. Reg. 20142 (1975).

Large, non-defense shipments of plutonium and other special nuclear materials are primarily for commercial use abroad in reactors. Almost all shipments of significant quantities of plutonium and highly enriched uranium were made by air in 1974 (Def. Aff., Ray, p. 5 and Kerr). Certain shipments of relatively small quantities are made for medical purposes, e.g., plutonium powered pacemakers of which there are only 500 implanted in human beings today. (Def. Aff. Rouse, p. 4).

The only reason for designating that shipments by air be made through John. F. Kennedy Airport and the New York City area is that "JFK is the major international airport on the East Coast" (Def. Aff., Rouse, p. 3).

Containers designed and currently authorized for the transport of plutonium have failed to remain intact after each of the impact tests run by Sandia Laboratories for the NRC at what the U.S. Environmental Protection Agency considers to be levels more indicative of actual crash environment impact levels than federal regulatory test levels. The EPA believes that more stringent standards for the design and fabrication of these types of packaging need to be adopted, as well as testing of performance at more stringent levels. (Def. Aff., Nussbaumer, Exh. D; EPA comments - Exxon Final EIS-Mixed Oxide Fabrication Plant, June 1974, pp. X34 and X35, supplied to the Court under separate cover). NRC test impacts would in fact be exceeded in at least 22% of all aircraft accidents (Def. Aff., Nussbaumer,

p. 8). NRC fire test levels would be exceeded in severity in at least 30% of all actual crash fires. (Def. Aff., Nussbaumer, p. 9). There has been no change in integrity design of such containers since 1968 (Def. Aff., Nussbaumer, p. 2).

If there is a dispersal of 10,000 curies of plutonium with all particles being of inhalable size in an area with a population density of 10,000 per square mile, from 983,080 to 4,844,077 persons would inhale plutonium under various meteorological conditions (Def. Aff., Barker, Exhibit B, Tables 1-9).

Plutonium poses a significant hazard to man, as it is a highly radiotoxic substance and, like highly enriched uranium, can cause demonstrable damage to the body if inhaled (Defendants' Memorandum of Law, p. 28; Def. Aff., Barker, pp.5-6). The most typical kind of plutonium transported by air is "reactor plutonium," which is even more radiotoxic than plutonium - 239 by itself (Def. Aff., Barker, pp.7-8). Death by radiation is caused within a few days by 260 micrograms of such plutonium deposited in the human lung. (Def. Aff., Barker, p. 7). As little as .01 micrograms of reactor plutonium in the lung might cause death within a 15 to 45 year period after inhalation (Def. Aff., Barker, p. 7).

Recently terrorist activity has increased and information on methods for constructing nuclear explosives has become available to the public. (Def. Aff., Page, p. 4). Terrorists

are capable of successfully carrying out attacks on transportation and facilities (Special Safeguards Study prepared for NRC, Exhibit R of Complaint).

Accordingly, even on the facts admitted by defendants, the possibility of irreparable harm has been more than amply demonstrated. Defendants, however, argue that plaintiff cannot show that, unless the preliminary injunction were granted, it would be impossible to turn back or alter the mode of transporting SNM in light of what the EIS will have revealed (Defendant's Memorandum of Law, p. 19). Their contention appears to have its origin in the language of the Second Circuit in Steubing v. Brinegar, 511 F. 2d 489 (2nd Cir. 1975), in which the court affirmed the issuance of a preliminary injunction halting further construction of a bridge pending filing of an EIS. The court noted that, without preliminary injunctive relief, construction might reach the stage of completion where it would be impossible to turn back or alter the project and thus avoid irreparable damage. Id. at 497. Obviously, in the case at bar, without preliminary injunctive relief, shipments will continue, with the concomitant possibility of large loss of human life. If such loss of life does occur, needless to say it will be impossible to "turn back or alter" that loss. The fact that thereafter the mode of transportation might be changed in light of what an EIS will have revealed will be of little comfort.

Defendants also claim that plaintiff cannot show irreparable harm since, in its capacity as an "Agreement State",

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief for plaintiff-appellant were served on counsel for defendants-appellees this 12th day of July, 1976.

JOHN F. SHEA, III

Sworn to before me this
12th day of July, 1976.

Assistant Attorney General
of the State of New York